

JACK KOUTCHAK

IBLA 75-77

Decided June 25, 1975

Appeal from Alaska State Office, BLM, decision, rejecting in part Native Allotment application, F-13488.

Affirmed as modified.

1. Alaska: Native Allotments

An allotment may issue where a qualified native shows at least five years' continued use and occupancy of land from which he earns subsistence and where his use potentially excludes that of all others.

APPEARANCES: John Scott Evans, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This is an appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 17, 1974, insofar as it rejected appellant's Native Allotment application to the extent of 120 acres. The application covered 160 acres and was filed under the provisions of 43 U.S.C. §§ 270-1 through 270-3 (1970). BLM approved the application for 40 acres.

A BLM realty specialist examined the land applied for. His examination is detailed in a report of March 1, 1973. It verified the representations of the application, that appellant has continuously used the land to the exclusion of others for subsistence hunting, fishing, and trapping, that appellant had a cleared camp area and had made other improvements during his occupancy, including paths or trails from the camp area to the far reaches of the tract. The realty specialist recommended that the 160-acre parcel be approved for allotment.

A later "Review of Field Report Recommendations" remarked that the realty specialist's year-old recommendation "was based on a policy interpretation that was in effect at the time. This

review is based on the October 18, 1973, guidelines." Cf. Herbert H. Hilscher, 67 I.D. 410 (1960). It recommended that the allotment be approved for only the 40 acres which would encompass the improvements of the applicant and the area of "substantial use." The State Office accepted the "Review" recommendation.

Appellant's counsel requested that appellant be afforded his constitutional rights to a "fair hearing." In view of our disposal of this appeal, appellant's request for a hearing is moot.

Assistant Secretary's Guidelines of October 18, 1973, liberalized the rules concerning the presentation of evidence in support of allotment applications. The Secretary did not change the statutory or regulatory requirements. We fail to understand how the liberalized guidelines concerning admissible evidence can serve to reduce the area properly recommended for allotment under the regulations in the previously approved field report. The record fails to show any examination of the land after March 1973.

[1] Appellant's statement of reasons and attached affidavit clearly show that he used the land for upwards of 40 years in his quest for subsistence. Appellant's improvements in and about the camp area are positioned to be readily accessible from the river. He has cut trails to the far reaches of the 160-acre area and has used the entire acreage as well as lands beyond for hunting, trapping and berry picking.

The realty specialist's report displays a familiarity with native customs and habits as well as the requirements of use and occupancy required by the regulations, 43 CFR Subpart 2561, Solicitor's Opinion, 71 I.D. 340 (1964), and Herbert H. Hilscher, *supra*. His report fully supports the application recitals and the evidence submitted by appellant. His recommendation comports with the law and regulations and we discern no reason to change it.

We hold that an allotment may issue where a qualified native shows at least five years' continued use and occupancy of land from which he earns subsistence, and where his use potentially excludes that of all others.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, allotment will issue for the 160-acre parcel applied for, all else being regular. The decision below is modified accordingly and is affirmed as

modified. The certificate of allotment will issue with appropriate flood hazard provisions. See Executive Order 11296 (August 10, 1966), 43 CFR 1725.2(b), and DM 420.2.2A.

Douglas E. Henriques
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

I cannot agree with the conclusion that the record at this time affords a sufficient basis for granting the allotment for 160 acres.

The field report, dated March 1, 1973, simply does not show what 40-acre tracts in the application have been occupied or used by appellant. The report states that certain improvements "are present on the 'land'" (which land could be in single 40-acre tract), and contains the conclusory statements that "[i]t appears the applicant has met the minimum use and occupancy requirements delineated in the Native Allotment Act of May 17, 1906," and "[i]t is recommended that the subject application be approved for 160 acres, one parcel, as applied."

There is nothing in the report which clearly demonstrates use and occupancy of the 160 acres. Similarly, there is no sound evidentiary basis to evaluate the correctness of the recommendation in the memo of February 28, 1974, that apart from one 40-acre tract, the remainder of the land "does not meet the substantial use requirements based on the regulations and present guidelines."

I note the main opinion relies on the "affidavit" signed by appellant, attached to the statement of reasons. It reads as follows:

My name is Mr. Jack B. Koutchak, and my Allotment No. is F-13488.

I am glad that my land is not disturbed. I use my land carefully. I use this land to put up fish and hunt moose.

This small piece of land is valuable to me. Therefore I do not like to loose [sic] any part of it. This land will also be used by my children in future, I work hard to clear it up. Cut brush & trees and small willows. When I first pick the land, it was so thick of brush & willows.

I also cut trail to a clearing to reach Blue berries back of this land. I am glad the Field examiner notice this trail back of this land. That shows I done lots of work. I catch moose from the sand bar right across this land 5 five years in the row. This land is located approximate 25 miles up Unalakleet river.

My closest neighbor is Mr. John Auliye above this land about 1 1/2 mile. He lives in Unalakleet. Contact him there for evidence. Also contact Mr. Roger Peter Nonouk, at Unalakleet, Alaska. Thank you so much for your concern. Signed Jack B. Koutchak.

/s/ Scott Evans
SCOTT EVANS
Attorney for Applicants

Even assuming, arguendo, that appellant's statements are correct, they do not compel the conclusion that his occupation and use area encompasses each 40-acre tract of the 160 acres.

While appellant is not entitled to a hearing, Pence v. Morton, Civ. No. A 74-138 (D. Alas., April 8, 1975); cf. LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964), I believe that the case in its present posture does not lend itself to the grant of an allotment of 160 acres to appellant.

I would remand the case to the Alaska State Office to afford appellant an opportunity to delineate more sharply the area of asserted use and occupation.

Frederick Fishman
Administrative Judge

